BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of		
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)))	MM Docket No. 92-266 MM Docket No. 93-215
	)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	))	CS Docket No. 94-28
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

To: The Commission

COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

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Comcast Cable Communications, Inc. ("Comcast" or the "Company"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1,419, hereby submits these Comments regarding the above-captioned matter.'

INTRODUCTION AND SUMMARY

During the nearly ten years since the Commission adopted its cable television rate regulations, the cable television industry has undergone significant changes. Aside from the legal changes implemented in accordance with the Telecommunications Act of 1996,[2] including the

[1] Revisions to Cable Television Rate Regulations, *Notice of Proposed Rulemaking and Order*, __ FCC Rcd __, FCC 02-177 (released June 19, 2002), 67 Fed. Reg. 56882 (Sept. 5, 2002); *Order*, __ FCC Rcd __, FCC 02-228 (released August 14, 2002), 67 Fed. Reg. 56880 (Sept. 5,2002) (collectively hereinafter, the "*NPRM*").

[2] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Telecommunications Act"); *see* Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996, *Report and Order*, 14 FCC Rcd 5296 (1999) **("*Cable*** *Act*
(continued. . .)

deregulation of cable programming service tiers ("CPSTs"),[3] the multichannel video program distribution ("MVPD") market has become robustly competitive, and what were nascent technologies such as direct broadcast satellite ("DBS") and high-definition television ("HDTV") have evolved or are evolving into thriving competitive businesses. These key intervening legal, marketplace, and technological developments plus experience gained with the Commission's existing rate rules all militate in favor of minimizing certain regulations that frankly have outlived their usefulness and have imposed undue burdens on cable operators and the Commission.

Comcast therefore wholeheartedly supports the Commission's determination to revisit and revise its regulations in light of these regulatory and competitive considerations. Comcast agrees that the focus of the Commission's efforts should be on "mechanical and procedural changes to the existing rules and forms"[4] rather than the establishment of a new regulatory scheme. These revisions should be consistent with the principles articulated in the 1992 Cable Act[5] and the Commission's initial rate regulation proceeding; namely, (i) "to reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission";[6] (ii) to "ensure that cable operators continue to expand, where economically justified";' and (iii) to "rely on the marketplace, to the maximum extent feasible"' to achieve these objectives. Despite the Commission's best intentions and diligent efforts, its existing cable rate regulations are complicated and confusing, and all too often have led to extended and

(. . . *continued)*
Reform Order").

3 ***See*** 47 U.S.C. § 543(c)(4).

4 *NPRM* at para. 3.

5 The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. NO. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

6 47 U.S.C. § 543(b)(2)(A).

7 1992 Cable Act, § 2(b)(3), 106 Stat. 1463.

8 *Id.*, § 2(b)(2), 106 Stat. 1463.

burdensome administrative proceedings.[9] Comcast consequently believes that the Commission should, wherever possible, simplify and streamline its existing rate regulations in a manner that is fair to both cable operators and their subscribers. Given today's robust competitive environment, the Commission should also review and eliminate rules and policies that would disrupt cable operators' legitimate marketing and business activities and thereby place them at an unfair disadvantage *vis á vis* their unregulated MVPD competitors.

With these fundamental principles in mind, Comcast urges the Commission to:

- Eliminate the "all rates in play" doctrine in connection with basic service tier ("BST") regulation just as the Commission did years ago for CPST regulation;
- Establish a uniform period for local franchising authority **("LFA")** review of BST rate adjustments under the quarterly and annual rate rules;
- Clarify that strict historical linkage in the unbundling of equipment costs no longer is required;
- Clarify that the "Mark-Up" method as adopted in the *Second Order on Reconsideration* applies to the addition and deletion of all regulated services;
- Treat rate adjustments for the addition and deletion of digital broadcast services under the same rules applicable to analog services;
- Clarify that rates charged to commercial establishments are unregulated;
- Presume that cable operators are subject to effective competition in any state where DBS penetration exceeds fifteen percent of occupied households;
- Deregulate customer premises equipment whose primary purpose is the provision of advanced digital and HDTV services;
- Clarify that charges for customer initiated changes in service are unregulated;

[9] Notwithstanding the sunset of CPST regulation in March 1999 and exceptional efforts by the Commission's staff both before and since, the processing of pending CPST rate complaints and BST rate order appeals remains a time-consuming administrative task for all parties.

- Allow cable operators to recover equipment and installation revenues lost due to unreasonable LFA rate orders by using FCC Form 1240; and
- Provide specific directions to LFAs in reversing unreasonable BST rate determinations and establish specific time periods in which LFAs must act in response to the Commission’s order.

In addition to the issues raised in the *NPRM*, Comcast also suggests that the Commission implement the following mechanical and procedural revisions to its existing rules, which “logically follow from the changed scope of regulation and intervening developments subsequent to the adoption of the initial rules”:”

- Delete the reference to “cable programming service” in Section 76.984(a) of the rules and clarify that the uniform rate structure rule is inapplicable to the now unregulated CPST,
- Include as an “external cost” under Section 76.922(f) of the rules, pole attachment fees cable operators are forced to incur for the provision of rate-regulated cable services. At the very least, the Commission should include in this rule pole attachment fees remitted to municipal and cooperative electric utilities, which are exempt from the protections afforded to cable operators and telecommunications providers under the Pole Attachment Act, 47 U.S.C. § 224; and
- Clarify that the Commission intends to retain the bill itemization rule.

[10] *NPRM* at para. **3.**

DISCUSSION

I. Initial Regulated Rates and Rate Adjustments.

A. The Commission Should Eliminate LFA Review of a Cable Operator's Entire Rate Structure and Limit Review to the Operator's Next Rate Increase After an LFA Becomes Certified to Regulate Rates Consistent with the Commission's Prior Determination in the *Thirteenth Reconsideration Order.*

Sound and practical considerations underlie the Commission's proposal to eliminate review of an operator's entire BST rate structure, which Comcast fully supports. This proposal is consistent with the Commission's determination in the ***Thirteenth Reconsideration Order***[11] because LFAs will be able to ensure the reasonableness of BST rates by reviewing only rate increases, just as the Commission was able to do in connection with CPST rates. Cable operators cannot reasonably be expected to justify current BST rates using eight- to ten- year-old rate, cost, and subscriber data from 1992 and 1994, which in most cases is no longer available. After nearly a decade of rate regulation, the current discretion given LFAs under the Commission's initial rules to review an operator's entire BST rate structure has become irreconcilable with the Commission's policies because it creates an uncertain business environment and imposes undue administrative burdens on cable operators and the Commission. Moreover, the failure of an LFA to request such information after such a long period in an increasingly competitive environment makes elimination of the existing rule compelling.

The Commission recognized the validity of these considerations in the ***Thirteenth Reconsideration Order,*** where it eliminated review of a cable operator's entire CPST rate structure if the operator's rates remained unregulated as of November 6, 1995.[12] Therefore, after

[11] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, ***Thirteenth Order on Reconsideration,*** 11 FCC Rcd 388 (1995) ***("Thirteenth Reconsideration Order").***

[12] *Id.* at 450-52, paras. 161-164. The *Thirteenth* ***Reconsideration Order*** became effective on November 6, 1995, thirty days after publication in the Federal Register. ***See id.*** at 453, para. 172; 60 Fed. Reg. 52106 (1995).

November 6, 1995, only the amount of a rate increase, and not the operator's initial 1993 rate, was subject to regulatory review. The Commission determined that an absence of rate regulation after only two years indicated a level of satisfaction with rates sufficient to deem an operator's earlier rates reasonable,[13] and that a policy of reviewing "an operator's entire rate structure" many years after the operator established regulated rates without objection from subscribers or LFAs "creates an uncertain business environment for cable operators."[14] The Commission recognized in 1995 that:

> subscribers and franchising authorities have had ample opportunity to file a complaint that would result in Commission review of operators' entire rate structure. . . . [and that] if subscribers and the franchising authority have not filed a CPST rate complaint, it indicate[d] a level of satisfaction with their current rates that would not exist if they believed CPST rates were unreasonable."

The Commission therefore concluded that it could "fulfill its responsibility to ensure that CPST rates are not unreasonable when only reviewing rate changes."“

After the passage of almost ten years, the Commission's policies which governed CPST rates *are* even more applicable in the BST context. If an LFA elected not to certify to regulate BST service and equipment rates during the many years since the Commission's rate regulations became effective, the operator's rates should be deemed reasonable. LFAs have had ample opportunities — in fact, almost ten years of opportunities — to initiate rate regulation and thereby review an operator's entire BST rate structure.

Moreover, cable operators cannot reasonably be expected at this late date to produce the detailed 1992 and 1994 subscriber, rate, cost, investment, and other financial data necessary to prepare initial FCC Forms 1200 and 1205, particularly because a very large percentage of cable systems have changed hands during this period. Assembling the material necessary to support

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13 *Id.* at 451-52, para. 164.

14 *Id.* at 451, para. 163.

15 *Id.* at 451-52, para. 164.

16 *Id.*

BST rate changes that have occurred during the past decade is extraordinarily difficult and unduly burdensome, if not impossible, and therefore is inconsistent with the statutory policies underlying the Commission's rate regulations.[17] As difficult as this task is today, it will only become more so in the years ahead. If a newly certified LFA becomes concerned about a BST rate increase, its concern can be addressed by requiring the operator to justify the magnitude of the new increase. This is a far simpler task than supporting the previously established rate through a long chain of rate forms, which would require data that simply is no longer available Yet, this much more limited review still addresses the LFA's objection to the latest rate increase and satisfies the statutory directive to ensure reasonable rates." If the operator is unable to fully support the most recent increase, whatever rate increase can be supported should build upon the previously unchallenged BST rate.

Comcast suggests the following procedure for BST rate adjustments that occur subsequent to an LFA's certification to regulate rates and its compliance with Section 76.910 of the Commission's rules.[19] Operators filing under the Commission's annual rate adjustment rules should be required to submit an FCC Form 1240 and FCC Form 1205 ninety (90) days in advance of the proposed rate adjustment in accordance with the same rules the Commission adopted in the ***Thirteenth Reconsideration Order*** for unregulated cable operators responding to a CPST rate complaint.[20] Similarly, operators filing under the Commission's quarterly adjustment rules should be required *to* submit FCC Forms 1210 and 1205 at least thirty (30) days in advance

[17] ***See*** 47 U.S.C. § 543(b)(2)(A).

[18] 47 U.S.C. § 543(b)(1).

[19] 47 C.F.R. § 76.910. Under no circumstances should operators be required to justify rates that pre-date the LFAs certification to regulate.

[20] ***See*** FCC Form 1240 Instructions at 2, 3, 4, 12, 14, 15, 16, 17, 18, 19, 27, and 30 (instructions for true-up, line A1 (current MPR), line C2 (unclaimed inflation), lines D1-D7 (base rate), line E1 (true-up type), Module F (true-up period 1 MPR), Module G (true-up period 2 MPR), Module H (true-up adjustment), Worksheet 2 (Caps adjustment), Worksheet **3** (Mark-Up adjustment).

of the proposed rate adjustment and should reflect their existing rate as the Permitted Charge on Line A2.[21] In either case, given the LFA's acceptance of existing rates as reasonable and given the operator's justification of equipment and installation rates based only upon current actual costs, no additional "unbundling" of service and equipment rates similar to that performed in initial Form 1200 and Form 1205 filings should be required."

LFAs that truly believe BST rates are unreasonable, particularly against the backdrop of increasing competition, simply have no excuse for not initiating rate regulation sooner. Indeed, Comcast has found that some LFAs use the prospect of initially regulating BST rates in 2002, with the daunting administrative burdens that it entails, more as a threat against the operator to obtain other concessions than an effort to find reasonable rates. Furthermore, because LFAs may only order refunds for a one-year period,[23] the administrative burdens of an "all rates in play" regime when balanced against permitting only the adjudication of rate increases certainly militates in favor of the latter.

The alternative option described in paragraph 27 of the *NPRM*, *i.e.*, to impute a rate from another regulated system "with as nearly comparable characteristics as possible" is unnecessarily complicated and impractical due to the large number of characteristics included in benchmark formula and should therefore be rejected. This alternative would lead to inevitable disputes between LFAs and cable operators regarding whether certain systems or characteristics would be "comparable." It also should be rejected due to the unnecessary administrative burdens it would impose upon cable operators, LFAs, and the Commission, and because, for the reasons discussed above, it would be manifestly unfair to the operator.

Assuming "all rates in play" is eliminated for the BST as the *NPRM* suggests, Comcast

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21 ***See*** FCC Form 1210 Instructions at 8. Assuming the Commission adopts Comcast's suggestion below to retire FCC Form 1200, the FCC Form 1210 Instructions will require minor conforming adjustments.

22 *See* Section II below.

23 47 C.F.R. § 76.942(c)(1)-(2).

believes that most of Section 76.922(b) of the Commission's rules, with the exception of Subsection 9, could safely be eliminated as well. Subsection 76.922(b)(9) (Updating data calculations)[24] should be revised and retained to avoid disputes between LFAs and cable operators regarding the refreshing of data in the Commission's rate forms that were current and accurate when the operator prepared its rate filing. With regard to FCC Form 1200, Comcast believes it has served its usefulness and should be retired. If the Commission determined otherwise, the FCC Form 1200 would require extensive revision to encompass only currently regulated services, equipment, and installations, and to establish rates based upon current, rather than 1992-1994, costs and information. This is a practically impossible task unless the Commission intends to re-invent BST rate regulation and establish a new competitive differential based upon current BST rates in competitive and non-competitive systems. The Commission should avoid such a result, which Comcast believes is unnecessary and which would tax the resources of the Commission, LFAs, and operators alike.

B. The Commission Should Provide LFAs with a Uniform Period in which to Issue BST Rate Orders Under both the Quarterly and Annual Rate Adjustment Rules.

The Commission should harmonize its annual and quarterly rate adjustment rules and provide a uniform one-year period in which an LFA either must issue its rate determination or be prohibited from ordering either refunds or prospective rate adjustments with regard to the rate justification at issue. In contrast to the one-year review period provided by the Commission's annual rate adjustment rules, the quarterly adjustment rules permit prospective rate reductions at any time, even many years after an operator has implemented a rate adjustment. Having reasonably relied upon an LFA's acceptance of its rate justification, operators should not be prejudiced by what can only be termed "stealth" rate orders issued unexpectedly many months or

[24] 47 C.F.R. § 76.922(b)(9).

years after the operator has submitted its rate filings and implemented rate adjustments without objection from the LFA.

In adopting its initial rate regulations, the Commission understood that "[f]ranchise authority review of a cable operator's . . . rates, require[s] expedition so that protracted proceedings and concomitant uncertainty do not injure an operator's ability to serve the community."" However, the Commission also understood that LFAs would require a reasonable period in which to consider the views of interested parties and to review more complex rate filings. The Commission therefore permitted proposed rates to become effective within thirty (30) days after filing of the appropriate rate form, but also allowed certified LFAs to delay the effective date of a proposed rate adjustment for an additional ninety (90) or 150 days by issuing a brief "tolling" order.[26] Under the Commission's quarterly adjustment rules, if at the end of the tolling period the LFA remains unable to determine whether the operator's proposed rates are reasonable, the LFA must issue an "accounting order" to preserve its jurisdiction to order subsequent refunds with regard to the operator's rate filing.[27] The Commission stated that "delaying rate determinations . . . for more than 120 [for benchmark filings] or 180 days [for cost-of-service filings], and the uncertainties likely to result therefrom, may have an adverse effect on a cable operator's operations, planning and financial stability." The Commission nevertheless credited LFA arguments that ''unusually complex cases" may require even longer

[25] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking,* **8** FCC Rcd 5631,5708 at para. 117 (footnote omitted) (1993) *('Rate Order").*

[26] Under the quarterly adjustment rules, LFAs are permitted to toll the effective date of a "benchmark" rate filing (FCC Form 1210) for an additional ninety (90) days and are permitted to toll a "cost-of-service''rate filing (FCC Form 1220) for **an** additional 150 days. ***See*** 47 C.F.R. § 76.933(b).

[27] 47 C.F.R. § 76.933(c). The LFA's "accounting order" must direct the operator "to keep **an** accurate account of all amounts received by reason of the rate in issue an on whose behalf such amounts were paid." *Id.*

periods to resolve." The Commission consequently permitted LFAs "to issue a written determination after 120 or 180 days and to order refunds for up to a one year period for any amounts later found to be inconsistent with the Cable Act or [the Commission's] rules."[29]

Many cable operators reasonably believed that the one-year period described in the *Rate Order* applied both to the LFA's written determination and its authority to order refunds. However, despite its acknowledgement that the Commission's rules were designed to protect cable operators "from having to operate in an uncertain regulatory environment for an indefinite period of time[,]"[30] the former Cable Services Bureau concluded in a series of cases under the quarterly rate adjustment rules that LFAs possessed unlimited authority to order prospective rate reductions *at any time* even where the LFA failed to comply with the Commission's rules regarding tolling orders and accounting orders.[31] Comcast submits that no justification can support continuing to allow LFAs such an open-ended period in which to adjust rates.

The Commission corrected this anomaly with regard to its annual rate adjustment rules in the *Thirteenth Reconsideration Order*.[32] Under the Commission's revised rules, LFAs are provided with an initial ninety (90) day review period and are required to act on the operator's

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28 *Rate Order*, 8 FCC Rcd at 5712, para. 121.

29 *Id*.

30 *TCI-TKR of Northern Kentucky,* 11 FCC Rcd 17353 at para. 20 (Cab. Sew. Bur. 1996).

31 *See. e.g.*, *Century Communications Corp.*, 11 FCC Rcd 9827 (Cab. **Sew.** Bur. 1996).

> If the franchising authority has not issued a rate decision or an accounting order by the end of the 120-day review period, the operator's proposed rates will go into effect and its existing rates will remain in effect without being subject to retroactive refunds. If the franchising authority subsequently issues a rate order, the franchising authority may not require subscriber refunds as part of its rate order. *However, the franchising authority may still prescribe rates and order a prospective rate reduction when it issues its rate order.*

Id. at para. 7 (footnotes omitted) (emphasis added). ***See** also, Falcon Telecable*, 11 FCC Rcd 9197 at para. 21 (Cab. Sew. Bur. 1996); *TCI-TKR of Northern Kentucky*, 11 FCC Rcd 17353 at para. 20.

32 11 FCC Rcd 388.

rate justification within twelve months after the operator submits a completed rate filing.[33] LFAs are not required to issue tolling or accounting orders to preserve their refund authority. However, if the LFA declines to act on the operator's rate filing within the twelve-month period "it may not at a later date order a refund or a prospective rate reduction with respect to the rate filing."[34] The Commission "set this time constraint on franchising authorities because . . . one year should provide ample time for review, and because operators need to have certainty with respect to their liability for refunds and whether their rates will be permitted to remain in effect."[35]

The Commission's policies set forth in the *Rate Order* and the *Thirteenth Reconsideration Order* apply with equal force regardless of whether the operator chooses to justify its BST rates quarterly or annually. Indeed, Comcast submits that no rational distinction can be drawn between the Commission's quarterly and annual rate regulations regarding policies designed to protect cable operators "from having to operate in an uncertain regulatory environment for an indefinite period of time."[36] Operators electing to file BST rate justifications under the Commission's quarterly adjustment rules should be equally entitled "to have certainty with respect to their liability for refunds and whether their rates will be permitted to remain in effect"[37] as those filing under the Commission's annual rules.

Moreover, the inconsistent time periods reflected in the Commission's current rules often lead to confusion and uncertainty for both LFAs and cable operators. For example, in Comcast's experience, LFAs may mistakenly issue tolling orders or accounting orders following submission of FCC Form 1240 (the annual rate adjustment form) or may adopt an order with regard to such a rate filing more than twelve months after filing under the mistaken belief that rate orders may be

[33] 47 C.F.R. § 76.933(g)(2).

[34] *Id.*

[35] *Thirteenth Reconsideration Order*, 11 FCC Rcd at 426, para. **92.**

[36] *TCI-TKR of Northern Kentucky*, 11 FCC Rcd 17353 at para. 20.

[37] *Thirteenth Reconsideration Order*, 11 FCC Rcd at 426, para. 92.

adopted at any time. This confusion and uncertainty obviously imposes unnecessary administrative burdens on both LFAs and cable operators, and ultimately on the Commission if an operator finds that it must appeal an untimely rate order.

The Commission consequently should harmonize its quarterly and annual rate adjustment rules. Comcast suggests that the rules be revised by appending the following two sentences from Section 76.933(g)(2) of its rules to the end of Section 76.933(c):

> If a proposed rate goes into effect before the franchising authority issues its rate order, the franchising authority will have 12 months from the date the operator filed for the rate adjustment to issue its rate order. In the event that the franchising authority does not act within this 12-month period, it may not at a later date order a refund or a prospective rate reduction with respect to the rate filing.

II. Unbundling.

A. The Commission Should Clarify that the Primary Purposes in Reviewing FCC Form 1205 are to Determine Whether Current Equipment and Installation Charges are Reasonable and Whether the Operator's Methodology is Consistent with its Previous Filing.

Another issue that has caused confusion and regulatory uncertainty among both cable operators and LFAs is the continued relevance of the Commission's initial rules regarding the "unbundling" of regulated service and equipment costs given the legal and regulatory changes that have occurred since adoption of the Commission's rate regulations. The Commission consequently should reduce undue administrative burdens on cable operators by clarifying that strict historical linkage in the "unbundling" of equipment costs is not required unless: (i) an LFA can convincingly assert that the cost in question was or was not unbundled when initial regulated rates were established; and (ii) the LFA can demonstrate that the operator deliberately manipulated its initial and subsequent rate filings to evade the Commission's rate regulations. In light of the equipment aggregation provisions of the statute and the Commission's rules, as well as settled expectations regarding previously approved regulated rates, cable operators should not, in fairness, be required to shoulder the practically insurmountable burden of demonstrating that each and every cost reflected in its current FCC Form 1205 filing was properly unbundled almost ten years ago. This is especially so where: (i) the current filing is consistent with its previous filing or filings that the LFA approved; (ii) the operator's filing includes data from multiple franchise areas in accordance with the equipment aggregation provisions of Section 623(a)(7) of the Communications Act[38] and Section 76.923(c)(1) of the Commission's implementing rules;[39] or (iii) the LFA is initiating BST rate regulation for the first time.

Several compelling practical reasons militate for de-coupling equipment and service rates. First, assembling the material necessary to understand a particular system's initial unbundling is extraordinarily difficult so many years after initial regulated rates were established. Information simply is not available, particularly because a very large percentage of cable systems have changed ownership during this period. And obtaining such information will only become more difficult in the years ahead.

Second, under the Commission's equipment aggregation process,[40] the direct link between service and equipment rates in any given community has become extremely attenuated. Prior to equipment aggregation, certain costs may have been unbundled in one community but not in another. Pursuant to the 1996 Telecommunications Act and the Commission's rules, however, both communities may now be reflected in the aggregated FCC Form 1205 filing. Given this reality, the burdens associated with rigid unbundling make little sense. No practical way exists to prepare an aggregated Form 1205 that perfectly tracks every unbundling decision made for the constituent cable systems, particularly because different systems with different original owners and unbundling methodologies may now be combined and averaged in a single Form 1205 filing. Even if the current operator somehow secured accurate information regarding the original unbundling for each system included in an aggregated filing, performing the

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38 47 U.S.C. § 543(a)(7).

39 47 C.F.R. § 76.923(c)(1)

40 *Id*.

allocations so that the various unbundlings were precisely represented in the aggregate filing would be virtually impossible.

Third, on a practical level, efforts expended on ensuring unbundling consistency are ill-spent. The impact on consumers, if any, is likely to be minimal. No evidence exists that operators deliberately left cost components bundled in the early days of rate regulation to gain the benefit of unbundling them now. Moreover, with rapidly increasing digital equipment costs, operators often establish rates for equipment well below their MPRs. Therefore, the administrative burden imposed on cable operators, LFAs, and the Commission by requiring strict historical linkage far outweighs any marginal potential benefit subscribers might receive in regulated equipment and installations.

Fourth, purported unbundling concerns may easily be misused to deny an otherwise properly justified rate filing. If an LFA truly believes that the operator has unduly manipulated the unbundling process, the proper course should be to file an "evasion" complaint with the Commission and demonstrate to the Commission's satisfaction that the operator deliberately manipulated the process so as to evade regulatory restraints.

At the onset of rate regulation, the Commission concluded in the *Rate **Order*** that pursuant to the congressional mandate to regulate equipment and installation rates based on actual cost it "should require the complete unbundling of the charges for equipment and installation."[41] Under the benchmark methodology the Commission adopted for determining initial regulated rates, "the benchmark rates are equipment-bundled averages . . . . [and] [o]nce the proper benchmark rate for full recovery of cable services costs and equipment is determined for a system, the operator's equipment portion is unbundled based on its actual cost for installation and customer equipment."[42] Consequently, the Commission's methodology established a reciprocal relationship between program rates and equipment rates in the initial

[41] *Rate **Order,*** 8 FCC Rcd at 5810, para. 288.

[42] *Suburban Cable TV, Inc.*, 13 FCC Rcd 13111 at para. 9 (Cab. Serv. Bur. 1997)

regulated rate calculation where "higher equipment costs resulted in lower programming rates, and lower equipment costs resulted in higher programming rates."[43]

As noted in the *NPRM*, in 1994 this reciprocal relationship led to concerns regarding practices that may, under certain circumstances, have constituted evasions of the rules in connection with initial regulated rates.[44]

> For instance, operators cannot now charge for services previously provided without extra charge (e.g., routine service calls, program guides) unless the value of that service, as now reflected in the new charges, was removed from the base rate number when calculating the reduction in rates necessary to establish reasonable rates.[45]

The Commission's cases have reached varying conclusions, however, with regard to the issue of whether this reciprocal relationship extends beyond the initial rate filing. On one hand, the Commission has held that cable operators are prohibited from including pre-existing costs in subsequent FCC Form 1205 filings without reducing programming service rates;[46] in other words, that the reciprocal relationship between equipment and service rates extends to

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[43] ***Comcast Cablevision of Detroit, Inc.***, 15 FCC Rcd 24022 at para. 30 (Cab. Serv. Bur 2000).

[44] *NPRM* at para. 40.

[45] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, ***Third Order on Reconsideration***, 9 FCC Rcd 4316, 4365 at para. 135 (1994) ***("Third Reconsideration Order").***

[46] ***See, e.g., TCI Cablevision of St. Louis, Inc.***, 12 FCC Rcd 15287 at para. 20 (Cab. Serv. Bur. 1997).

> When TCI-SL filed Form **1205,** in 1994 and 1995, TCI-SL did not include these insurance costs in its calculation of equipment basket costs. These costs, therefore, were recovered in program service rates. In assigning these costs now to its equipment basket, TCI-SL should have deducted them from its program service rates, otherwise TCI-SL would be recovering these costs twice. TCI-SL bad these costs at the time it unbundled its rates, but only now identifies these costs as ones that should be included in the equipment basket, thereby revealing that TCI-SL's original unbundling was inadequate. TCI-SL did not, as it should have done, propose equitable adjustments to programming service rates on a going forward basis.

See also TCI Cablevision *of Nevada,* ***Inc.***, 11 FCC Rcd 14378 at paras. 14-16 (Cab. Serv. Bur. 1996).

subsequently submitted rate filings. On the other hand, the Commission also has held that "[t]his reciprocal relationship does not extend beyond the initial unbundling."[47]

In any event, the Commission has recognized that retroactive revision of the unbundling process presents practical problems, creates undue administrative burdens, and would interfere with the finality of its rate regulations process.[48] Given the passage of almost nine years since cable operators were required to unbundle service and equipment rates, during which time LFAs have had ample opportunities to question whether particular costs were included or excluded from an operator's initial unbundling calculation, Comcast believes the Commission should resolve the apparent inconsistencies in these cases and find as a matter of basic fairness and regulatory certainty that strict historical linkage in the "unbundling" of equipment costs is not required.[49] LFAs should not be permitted to create a regulatory "Catch-22" for cable operators by accepting the operator's Form 1205 costs for years only to object many years later and either

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47 *Comcast Cublevision of Detroit, Inc.*, 15 FCC Rcd 24022 at para. 30; see *also TCI Cablevision of Ohio, Inc.*, 13 FCC Rcd 733 at para. 11 and n.21 (Cab. Serv. Bur. 1998); *Telerama, Inc.*, 11 FCC Rcd 17369 (Cab. Serv. Bur. 1996).

48 In *Western Reserve Cablevision,* for example, the Commission found that:

> Because of the reciprocal relationship between equipment costs and regulated revenues for programming tiers, reopening the unbundling of the monthly equipment cost per subscriber computed on FCC Form 1205 from the operators' total regulated revenue in Form 1200 would reopen the BST rates and refunds determined in the *Adelphia Resolution.* If the equipment rates were reduced as a result of a revised unbundling process, the revenues for computing the tier rates would he adjusted upward and the initial regulated rate would he increased. . . . For this reason and because the **LFAs'** rate orders did not address the operators' computations of additional outlet charges . . . we agree with Adelphia that review of [the LFA rate orders] with respect to additional outlet costs unbundled from the BST rates has been rendered moot by the *Adelphia Resolution,* 12 FCC Rcd at 6364 . . . .

Western Reserve Cablevision, Inc., 14 FCC Rcd 13391 (Cab. **Sew.** Bur. 1999) (citation omitted) (citing *Century Communications Corp.*, 12 FCC Rcd 18009, 18020 (1997)).

49 In other words, LFAs should be (i) prohibited from removing *bona fide* pre-existing costs from an operator's FCC Form 1205 that the LFA accepted in prior filings without a commensurate offsetting increase in regulated service rates; and (ii) required to demonstrate that any category of costs it claims should be excluded from the operator's Form 1205 were in fact not included the initial Form 1205 used to unbundle rates.

(i) demand that **the** operator demonstrate such costs were properly unbundled in 1993 or 1994, or (ii) reject costs that the operator included in its initial FCC Form 1205 used to unbundle service and equipment rates. Indeed, in analogous contexts, the Commission's rules specifically limit the LFA's oversight authority to a one-year period.[50] This approach would be consistent with the Commission's elimination of "all rates in play" in the *Thirteenth Reconsideration Order* based, among other things, upon the LFA's determination to accept the operator's previous rates as reasonable.[51] It also would be consistent with a determination, as discussed above, that **LFAs** should not be entitled to review a cable system's entire BST rate structure after sitting on its rights for almost ten years, as well as the Commission's acknowledgement in *TCI Cablevision of St. Louis*[52] that the rate regulation process should lead to equitable results.

For the foregoing reasons, Comcast believes that to maintain the integrity of the Commission's rate regulation process, ensure fairness to cable operators, and achieve the statutory purpose of reducing the administrative burdens associated with rate regulation, the Commission should clarify that strict historical linkage in the unbundling of equipment and installation costs is not required.

III. Rate Adjustments When Channels are Added or Deleted From the BST.

A. The Commission Should Re-Affirm its Determination in the *Sixth Order on Reconsideration* that the "Mark-Up" Methodology of Adjusting Regulated Rates for the Addition and Deletion of Programming Services Applies to All Regulated Channel Changes Implemented After December 31,1997.

Among the issues the Commission has taken up in the *NPRM* is the manner in which rates should be computed for the addition and deletion of programming services on regulated tiers, which has created much confusion and uncertainly for both LFAs and cable operators over

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50 ***See*** 47 C.F.R. § 76.933(g)(2); 47 C.F.R. § 76.942(b).

51 *Thirteenth Reconsideration Order*, 11 FCC Rcd at 451-52, para. 164.

52 *TCI Cablevision of St. Louis, Inc.*, 12 FCC Rcd 15287 at para. 20.

the past five years. This confusion and uncertainty occurred because the Commission's temporary rules governing such rate adjustments expired on December 31, 1997, but an inadvertent error in the codification of the rules failed to reflect the Commission's explicit instruction to reinstate Section 76.922(e) as it existed prior to adoption of the *Sixth Order on Reconsideration.*[53] As explained in detail below and in the Historical Appendix attached hereto, the Commission should adhere to its previous determination that the Mark-Up method should be used to adjust the non-external portion ofregulated rates to account for the addition or deletion of regulated services for all such changes beginning January 1, 1998.

Unlike the other alternatives presented in the *NPRM,* the Mark-Up methodology should continue to be used because it: (i) is simple; (ii) is well understood by cable operators and LFAs; (iii) imposes relatively few administrative burdens on cable operators, LFAs, and the Commission; and (iv) is fair to both cable operators and their customers. The sunset of CPST regulation provides no persuasive reason for the Commission to reverse course, and, as demonstrated herein, the concerns articulated in the *NPRM* will be fully addressed by implementing the Commission's earlier decision.

To be fair to both cable operators and their subscribers, whatever method the Commission chooses should result in the same non-external rate adjustment regardless of whether programming services are added to or deleted from the regulated BST. Comcast submits that the interim rule announced in paragraph 55 of the *NPRM* (the "Interim Order") should not be made final because it will result in substantial rate reductions when regulated services are removed from the BST but only miniscule rate adjustments when the same services are added. The Interim Order directs LFAs to accept non-external rate adjustments for the *addition* of

[53] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Sixth Order on Reconsideration. Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226,1260 at para. 98 (1994) *("Sixth Reconsideration Order"), aff'd Adelphia Communications Corp. v. FCC,* 88 F.3d 1250 (D.C. Cir. 1996). The Commission's rule as it existed prior to the *Sixth Reconsideration Order* is attached hereto as Exhibit 1 and the rule in effect subsequently is attached hereto as Exhibit 2.

programming services to the BST based upon the Mark-Up method found in Section 76.922(g)(2) of the rules, as modified by paragraph 19 of the *NPRM*, but permits LFAs to require that rate adjustments for deletion and substitution be calculated consistent with former Section 76.922(g)(4) and (g)(6).[54] In practical terms this means that cable operators will be limited to a $0.01 non-external rate increase when a programming service is added to the BST (the likely amount calculated pursuant to the Mark-Up method as modified by the *NPRM*; *i.e.*, Section 76.922(g)(2)), but will be required to reduce its rate by between $0.30 to $0.50 per channel whenever the same BST programming services are moved or deleted (the likely amount calculated pursuant to the Caps channel movement and deletion rules, Section 76.922(g)(4) and (g)(6), which expired by their terms almost six years ago).[55]

Unless the Interim Order is rescinded, therefore, it will lead to patently and fundamentally unfair results. For example, pursuant to the terms of a local franchise agreement, a cable operator may be required to activate a channel for public, educational, or governmental ("PEG) use that is later returned and deleted from the operator's BST channel line-up when insufficient programming is available to sustain the PEG channel.[56] Under the rule announced in the Interim Order, the operator would be required to substantially reduce its rate even though its customers

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[54] *NPRM* at para. 55, as amended by *Order*, __ FCC Rcd __, FCC 02-228 (released August 14, 2002), 67 Fed. Reg. 56880 (Sept. 5,2002).

> For rate adjustments filed with franchising authorities after this clarification, franchising authorities reviewing rates should accept rate adjustments for channels added to the BST using the per channel adjustment factor in section 76.922(g)(2), based on the number of channels that would have been subject to regulation if CPST rate regulation had not ended. Franchising authorities should also accept and may require rate adjustments for channel deletions and substitutions consistent with section 76.922(g)(4) and (g)(6), respectively. The calculations should be done using FCC Forms 1210 and 1240. We will review appeals of local rate orders consistent with this approach.

Id. (footnote omitted).

[55] "The new rule for adjusting rates when channels are added, deleted or substituted . . . will be in place through December 31, 1997 . . . ." ***Sixth** Reconsideration Order,* 10 FCC Rcd at 1260, para. 98.

[56] ***See*** 47 U.S.C. § 531(d).

would be receiving the *same* services and even though the operator's costs remained unchanged. This anomalous result may be avoided by clarifying that the per-channel adjustment factor now located in Section 76.922(g)(2) of the rules should be used to calculate the non-external cost adjustment for both the addition and deletion of regulated BST programming services.

Moreover, as discussed below, what the Interim Order suggests is irreconcilable with the Commission's determinations in both the *Second Reconsideration Order* and the *Sixth Reconsideration Order.* Comcast submits that **a** review of the Commission's extensive cable rate regulation proceedings conclusively demonstrates that the rule announced in the *Second Reconsiderution Order,* which the Commission ordered reinstated in the *Sixth Reconsideration Order,* properly balances the interests of cable operators and their customers in the current environment where only BST rates may be regulated. The existing rules adopted in the *Second Reconsideration Order* also result in fewer administrative burdens for operators, LFAs, and the Commission than the other alternatives discussed in the *NPRM,* and therefore comport more closely with the congressional policies underlying the Commission's rules. The Commission consequently should clarify that the rules adopted in the *Second Reconsideration Order*[57] govern rate adjustments for both the addition *and* deletion of BST services.

(1) The History **of** the Commission's Cable Rate Regulation Proceeding Demonstrates that the Mark-Up Methodology Adopted **in** the *Second Reconsideration Order* Should be Used for the Addition and Deletion of Regulated Services.

As explained in the attached Historical Appendix, the Commission specifically determined in the *Sixth Reconsideration Order* that the interim rules it adopted for the addition, deletion, and movement of regulated programming services — including the Caps methodology for adding new CPST programming services and the temporary associated rule for calculating the

[57] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemuking,* 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order"); see* Exhibit 1.

non-external, or "residual" portion of the regulated rate for purposes of shifting programming services between regulated service tiers — wouldbe replaced as of January 1, 1998 by the pre-existing Mark-Up methodology adopted in the *Second Reconsideration Order*.[58] As noted above, due to an error in the codification of the Commission's rules, however, the pre-existing rules adopted in the *Second Reconsideration Order* were not restated as the Commission intended.[59] Instead, the codification of the Commission's rules literally eliminated *any* methodology for adjusting rates to reflect the addition and deletion of programming services from regulated tiers.[60] Unfortunately, this has resulted in confusion and unnecessary administrative burdens for both LFAs and cable operators

The Commission's temporary rule, which expired December 31, 1997, permitted a modest non-external rate adjustment for the addition of a new BST programming service, but required a substantial adjustment if an existing BST programming service were deleted or moved to the then regulated CPST.[61] In contrast, the Commission's pre-existing Mark-Up methodology

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58 ***See*** Historical Appendix and Exhibit 1, attached hereto; ***Sixth*** *Reconsideration Order,* 10 FCC Rcd at 1260, para. 98.

59 The Commission expected all of its interim rules to expire without further action on December 31, 1997, ***Sixth*** *Reconsideration Order*, 10 FCC Rcd at 1260, para. 98, and it did not announce any intention to permanently alter the manner in which BST rate adjustments would be calculated. However, although Section 76.922(e)(8) of the Commission's revised rules stated that "[p]aragraph (e) of this section shall cease to be effective on January 1, 1998 unless renewed by the Commission," 47 C.F.R. § 76.922(e)(8) (1995) and although the Commission declined to renew the revised Section 76.922(e), the codification of the Commission's rules failed to reflect the Commission's direction to reinstate Section 76.922(e) as it existed prior to adoption of the *Sixth Reconsideration Order*. *See* Exhibit 1 (following the Commission's adoption of the annual rate adjustment methodology, Section 76.922(e) of the Commission's 1995 rules was relocated to Section 76.922(g). *See* 47 C.F.R. § 76.922(g) (2001)). The FCC Forms 1210 and 1240 also have not been revised to reflect reinstatement of the pre-existing channel movement and deletion rule.

60 ***See*** 47 C.F.R. § 76.922(g)(8) (2001).

61 *See* Exhibit 2. The interim rule permitted an adjustment of, *e.g.*, between $0.01 and $0.03 for the addition of a new BST programming service, but required between approximately a $0.30 to $0.50 adjustment if an existing BST programming service were deleted or moved to the then regulated CPST.

would result in the same non-external rate adjustment regardless of whether programming services were added or deleted. The Commission's interim methodology for adjusting regulated rates to account for the movement of channels between regulated tiers made at least some sense in 1994, given: (i) the context of the new Caps methodology where both the BST and the CPST were subject to rate regulation; (ii) Commission policies that were designed to provide an incentive to add programming services to the CPST rather than the BST; and (iii) a need to ensure that the operator's regulated residual costs and Caps method adjustments were accurately distributed between tiers when programming services were moved between regulated BSTs and CPSTs. In the current environment, however, where the BST is the only tier subject to regulation and intervening changes in technology and competition have dramatically altered the MVPD market, continuing to maintain the Commission's *Sixth Reconsideration Order* methodologies, as suggested by the alternative set forth in paragraph 20 of the *NPRM* and in the Interim Order,[62] is inconsistent with the Commission's previously established decisions and produces anomalous results.

The Commission understood that its interim rules constituted a single integrated approach that would simultaneously provide an incentive to add CPST programming (the Caps methodology) and establish a methodology for adjusting rates to reflect the addition, deletion, and movement of programming services between regulated tiers. It also understood that its pre-existing methodology established in the *Second Reconsideration Order* provided a comprehensive approach to the addition, deletion, and movement of regulated services that should be used in the absence of the Caps methodology. Read literally, however, the current codification of the Commission's rules provides no methodology for adjusting rates to account for the addition or deletion of channels after December 31, 1997 despite the Commission's

[62] *NPRM* at para. 55, as amended by *Order,* __ FCC Rcd __, FCC 02-228 (released August 14, 2002), 67 Fed. Reg. 56880 (Sept. 5,2002).

explicit instruction otherwise.[63] Given the Commission's explicit instructions in the *Sixth Reconsideration Order* and the pre-existing channel addition and deletion rule adopted in the *Second Reconsideration Order,* the Commission should clarify that the pre-existing rule applies to the non-external price adjustment for the addition and deletion of channels on all regulated service tiers except for the deletion of "Caps" channels from single-tier systems, which should reflect the actual per-channel adjustment taken when such channels were added to the operator's channel line-up.[64] This is substantially similar to the methodology proposed in paragraph 19 of the *NPRM.*

(2) The Commission Should Adopt a Modified Form of the Proposal Set Forth in Paragraph 19 of the *NPRM.*

Comcast fully supports the policy objectives regarding the addition and deletion of regulated services outlined in the *NPRM,* namely: (1) to provide operators with an appropriate return on investment in facilities and programming services; (2) to ensure that subscribers only pay for the services they receive; **(3)** to reflect the fact that unit cost of a channel declines as the total capacity of the system increases; and (4) to make the consequences of shifting channels

63 As the Commission is aware, this has led to confusion and uncertainty. For example, certain LFAs have claimed that operators were not entitled to any non-external cost adjustment for the addition of BST channels required by law or contract, such as "must-carry" television broadcast stations required by Section 614 or 615 of the Communications Act and public, educational, and governmental ("PEG) channels required under local franchises or franchise renewal agreements. Similarly, the void in the Commission's rules also suggests that BST channels may be deleted without making a non-external cost adjustment to the regulated BST rate. The problem becomes particularly acute for cable operators and LFAs attempting to calculate BST rates for systems that re-tier a formerly single-tier offering into a separate BST and CPST.

64 To reflect the Commission's intent, operators would use FCC Form 1240, Worksheet **3,** for the addition and deletion of BST channels implemented beginning January 1, 1998, except for "Caps" channels added to single-tier systems, which would continue to be accounted for in Worksheet 2, and would eliminate use of Worksheets 4 and 5. Similarly, operators would use FCC Form 1210, Module G for the addition and deletion of BST channels implemented beginning January 1, 1998, except for "Caps" channels added to single-tier systems, which would continue to be accounted for in Module F, and would eliminate use of Module H.

between regulated tiers revenue-neutral to the operator and therefore avoid creating an incentive to move channels between tiers.[65] Comcast also believes the Commission should affirm two unstated but implied policy objectives, namely: (i) to simplify wherever possible the Commission's rate regulations and reduce burdens on cable operators and franchising authorities; and (ii) to avoid any rules that would disrupt cable operators' otherwise valid marketing and business decisions.

Comcast submits that each of these policy objectives can be achieved simply by implementing the Commission's previous determination to reinstate the Mark-Up method for adjusting regulated rates to reflect the addition or deletion of programming services. The Mark-Up methodology is superior to the other alternatives suggested in the *NPRM* because it is simple and well understood by cable operators and LFAs and because — by requiring the **same** non-external per-channel adjustment for both additions and deletions — it is fair to both cable operators and their customers. Moreover, reinstatement of the Mark-Up methodology will impose the fewest administrative burdens on cable operators, LFAs, and the Commission, and therefore is consistent with the policies underlying the 1992 Cable Act. The sunset of CPST regulation provides no reason for the Commission to reverse course in midstream.

Although the Mark-up method is the essence of the proposed approach outlined in paragraph 19 of the *NPRM*, the proposal suggests "identifying the specific amount of adjustment not by reference to the number of 'regulated channels' but by reference to the current number of channels that would be subject to regulation if CPST rate regulation had not ended."[66] The *NPRM* asserts that continuing to use the Mark-Up methodology without this alteration would be inappropriate because the Commission's benchmark rates were "derived from a study based on data from both BST and CPST channels combined and . . . reflect[] the declining price of

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[65] *NPRM* at para. 17.

[66] *NPRM* at para. 19.

channels as total channel capacity increases."[67] Comcast understands the basis of the concern expressed in the *NPRM.* Comcast, however, submits that implementing this alteration is unnecessary. Reference to a fictional number of channels that *would* be subject to regulation *if* the 1996 Telecommunications Act had not become law will have an insignificant impact in practical terms on the overwhelming majority of non-external rate adjustments because Section 76.922(g)(2) of the rules provides for an adjustment of $0.03 or less whenever the average number of regulated channels exceeds thirty,[68] which is virtually always the case in modem cable systems. Moreover, because the benchmark curve results in larger per-channel adjustments as the number of regulated channels is reduced, cable subscribers would tend to receive greater rate reductions when programming services are removed from the BST using the Commission's original Mark-Up methodology than using the modified methodology suggested in paragraph 19.

The *NPRM* also expresses concern that the modified Mark-Up methodology proposed in paragraph 19 "will have only a minimal impact on BST rates when channels are deleted."[69] Comcast believes this concern is misplaced because it fails to consider that the per-channel adjustments reflected in Section 76.922(g)(2) of the rules represent only the non-external, or "residual" portion of the regulated rate. A significantly larger rate reduction results from the required removal of marked-up external costs such as the license fees cable operators pay to programming providers and Caps method adjustments included in the rates of single-tier systems. Indeed, the restructuring of single-tier systems into a separate BST and CPST will be the most common scenario in which a substantial number of signals are removed from the regulated BST. The Mark-Up method, therefore, will have a significant impact on rates when channels are deleted that will be proportionate to the actual cost of providing the relevant regulated programming services to subscribers. Moreover, in fairness to both cable operators and their

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67 *Id.*

68 See 47 C.F.R. § 76.922(g)(2).

69 *NPRM* at para. 19.

customers, the Mark-Up method would result in the same non-external rate adjustment regardless of whether regulated programming services are added to or deleted from the regulated BST. Comcast therefore urges the Commission to adhere to its previous determination and reinstate the Mark-Up methodology as set forth in the *Second Reconsideration Order* and the rules implemented thereunder.

The remaining alternatives outlined in the *NPRM* should be rejected. The notion outlined in paragraph 18, that only external costs should be recognized when channels are added or deleted, is irreconcilable with the Commission's established policies, would ensure that no channels are voluntarily added to the BST, and would unfairly penalize operators who are required by law or contract to add "must-carry" or "PEG" programming to the BST. Similarly, no basis exists for the alternatives suggested in paragraph 20 of the *NPRM*. The Commission should not retroactively resurrect a methodology that it specifically determined to be inappropriate for use after December 31, 1997 and that requires grossly unbalanced rate adjustments depending upon whether regulated programming services are added or removed from the BST. **As** noted above, although that methodology may have been justified in 1994 to account for the movement ofprogramming services between regulated BSTs and CPSTs in the context of the now defunct interim Caps channel addition methodology for CPSTs, it has no justification in the absence of the Caps methodology and where only the BST is regulated.

Finally, Comcast believes the Commission should avoid expending valuable resources on attempting to calculate a "residual" rate pursuant to the expired Caps channel movement rules[70] or on the unduly burdensome task of attempting to "establish new BST per-channel values through new benchmarks based on an updated comparison of BST rates charged by competitive and non-competitive systems."" First, calculating a "residual" rate for an unregulated service under the expired Section 76.922(g)(4)-(5) of the rules is impossible because the various

[70] 47 C.F.R. § 76.922(g)(4)-(5).

[71] *NPRM* at para. 22.

segments of the regulated rate — *e.g.*, External, Residual, Caps, Mark-Up, Headend Upgrade, Inflation, True-Up, Channel Movement and Deletion — are both meaningless and unascertainable for unregulated programming services. Simply put, no per-program or tier "residual" can exist absent regulated rates for the subject services and tiers. Second, the notion that the Commission should undertake an entirely new benchmark survey of competitive and non-competitive BST rates would be a massive undertaking in what has become a highly competitive MVPD market where CPST services are no longer regulated. Given these considerations, such a massive retooling of the benchmark regime would be irreconcilable with the 1992 Act's policy of reducing administrative burdens and would also contradict the Commission's stated intention "to focus on mechanical and procedural changes to the existing rules and forms."[72]

IV. Digital Broadcast Television Rate Adjustment Issues.

A. The Commission's Rules Should Treat Rate Adjustments for the Addition and Deletion of all Regulated Programming Services Equally.

Comcast agrees the Commission's policies regarding BST rate adjustments for digital broadcast services should ensure "that cable operators have sufficient incentives to add digital television signals, particularly during the transition from analog to digital service, that subscribers should bear a fair share of the costs of providing service on the tier carrying digital signals relative to the system's overall capacity, and that subscriber rates be reasonable."[73] Comcast believes, however, that the proposal set forth in the *DTV Must Carry* proceeding[74] — namely, to allow non-external rate adjustments only for each 6 MHz of cable system capacity

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[72] *Id.* at para. **3.**

[73] *Id.* at para. *26.*

[74] Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking,* 16 FCC Rcd 2598 (2001) ("*DTV Must Carry Order*").

devoted to carriage of digital broadcasts rather than for each regulated programming service[75] — will retard rather than accelerate realization of the Commission's goals.

The Commission should instead require that non-external rate adjustments for the addition or deletion of *all* regulated programming services be determined in accordance with the Mark-Up methodology adopted in the *Second Reconsideration Order*[76] regardless of the technology used to transmit or receive those programming services.[77] Cable operators should be permitted a non-external rate adjustment for each digital broadcast programming service rather than for each 6 MHz of capacity devoted to carriage of digital signals because (i) technological changes now allow multiple digital programming services, or what are commonly referred to as "channels," to be carried in each digital 6 MHz spectrum segment[78] and because (ii) the modest non-external rate adjustment permitted under the Mark-Up method will ensure that subscriber rates remain reasonable (to the extent the same adjustment is required for the deletion of those services).

This approach achieves each of the Commission's policy goals. Allowing cable operators a non-external cost adjustment for each digital broadcast programming service added to (or deleted from) their regulated tiers will provide an incentive to add digital television broadcast programming services and thereby fulfill the Commission's goal of accelerating the transition to digital television broadcasting.[79] The Commission has recognized that "[b]ecause the cable

75 *Id.*, 16 FCC Rcd at 2656-57, paras. 133-34.

76 *See* Exhibit 1, 47 C.F.R. § 76.922(e)(1) (1994).

77 **As** suggested in the *DTV Must Carry Order,* this may entail a revision to how "channels" are counted in this context. 16 FCC Rcd at 2657, para. 134 ("We also seek comment on how channels should be counted in light of the sunset of CPST rate regulation.").

78 Although the Commission and the industry are accustomed to thinking of a channel as synonymous with 6 MHz of spectrum, the Commission's rules should now recognize and reflect the evolution of the industries it regulates.

79 The Commission's policies recognize that "cable operators should have incentives to add digital television broadcast programming, particularly where operators carrying a broadcast station's analog signal during the transition period must assign spectrum to accommodate digital *(continued. . .)*

industry operates in an increasingly competitive environment . . . subscribers who purchase digital programming, including digital broadcast programming, should bear a fair share"[80] of the costs associated with providing that programming. The modest non-external rate adjustment that would be permitted under the Commission's Mark-Up methodology for each programming service is fair to both cable operators and subscribers, and will ensure that rates remain reasonable. Furthermore, the Mark-Up method is simple, well-understood by cable operators and LFAs, and, in contrast to the proposal set forth in the *DTV Must Carry **Order***, will require no changes to the Commission's rate calculation forms. Therefore, application of the Mark-Up methodology to each programming service, rather than devising a new methodology to compensate cable operators for each 6 MHz of capacity devoted to the carriage of digital broadcast programming, will not only serve to accelerate the transition to digital broadcasting, but will provide a stable and certain regulatory environment and will "reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission"[81] in accordance with congressional policies.

B. The Commission Should Provide Cable Operators with Flexibility Regarding Recovery of Headend Equipment Costs Necessary for Carriage of DTV Signals.

Comcast supports the Commission's proposed clarification in paragraph 25 of the *NPRM* that cable operators are permitted to recover the costs of purchasing and installing headend equipment necessary for carriage of DTV signals either as an external cost pursuant to Section 76.922(f)(1)(vii) of the Commission's rules or as a network upgrade cost under Section 76.922(j)(1). Comcast believes, however, that the Commission should allow operators the

(. . . continued)
signals." *Id.* The Commission has also recognized that "maximizing the introduction of digital broadcast television" serves "a number of statutory and public policy goals inherent in Section 614 and 615, and other parts of the Act." *Id.* at para. 4.

80 *Id.*, 16 FCC Rcd at 2657, para. **134.**

81 47 U.S.C. § 543(b)(2)(A).

flexibility to elect either methodology at any time; in other words, operators should not be restricted from switching between recovery methodologies, just as operators are permitted to switch between the Commission's quarterly and annual rate adjustment methodologies.**

Comcast observes that although the Commission theoretically allowed cable operators to recover such expenditures as external costs in the *DTV Must **Carry** Order*,[83] it did not amend its rate forms (FCC Forms 1240 or 1210) to facilitate that recovery. Corncast therefore suggests that the Commission amend the description of Line 708 in FCC Form 1240, Worksheet 7, to include "DTV Headend Equipment Costs For Period" as well as the current "Commission Regulatory Fees For Period." Comcast believes that such DTV headend equipment costs should be amortized over the useful life of the equipment in a manner similar to that of analogous franchise related costs. In the alternative, the Commission may wish to consider allowing all operators, rather than only small systems, to use Worksheet 6 of FCC Form 1240 (Headend Upgrade) to perform this calculation, although this methodology may require more extensive revisions to the Commission's rules and rate forms.

V. Commercial Rates

A. The Commission Should Clarify that Service and Equipment Rates for Commercial Establishments are Unregulated Under the Cable Act.

As the Commission is aware, the status of commercial cable television rates under the Commission's rules is an issue that has been lingering for over eight years.[84] Comcast believes that as a legal matter Congress never intended commercial rates to be subject to rate regulation because commercial establishments are not considered households under the 1992 Cable Act.

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82 ***See*** 47 C.F.R. § 76.922(c)(3).

83 *DTV Must **Carry Order,*** 16 FCC Rcd at 2646-47, paras. 109-110.

84 The Commission initially declined to establish separate regulated rates for commercial establishments in 1994, ***Second Reconsideration Order,*** 9 FCC Rcd at 4208, para. 185, but requested comment regarding "whether [it] should establish regulations governing rates for regulated cable service provided to commercial establishments." *Id.* at 4248, para. 257.

Moreover, the significant competitive and technological developments that have occurred in the MVPD market over the last several years validate the proposition that commercial rates should not be subject to regulation because commercial rates are sufficiently restrained by market forces, including effective competition from DBS, SMATV, and other cable operators.

Indeed, LFAs generally have declined to regulate commercial rates because they have understood that (i) commercial establishments use cable services to attract customers and provide those services to large audiences for profit; (ii) commercial rates are routinely permitted and accepted in related businesses such as telephone and electric service; and (iii) commercial establishments are a reasonable category of customer for which cable operators should be permitted to establish separate and unregulated rates. The Commission should therefore use this opportunity to take notice of these developments and distinctions, and should finally clarify that rates charges to commercial establishments are not subject to regulation.

(1) Congress did not Intend to Apply Section 623 to Commercial Rates.

Commercial rates should remain free of regulation because Congress did not intend for Section 623 of the Communications Act to be applied to rates paid by commercial establishments. Consistent references to "households" throughout the 1992 Cable Act, its legislative history, and the Commission's implementing orders demonstrate that neither Congress nor the Commission intended Section 623 to he applicable to rates for commercial establishments. For example, the Commission repeatedly has recognized under Section 623 that "[b]oth the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of 'households' in the franchise area."[85] Indeed, "[s]ince the enactment of the 1992 Cable Act and its implementation, the Commission has required that

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[85] *Horizon Cable I Limited Partnership*, 10 FCC Rcd 3442 at n.16 (Cab. Serv. Bur. 1995) (citing 47 U.S.C. § 543(*l*)(1); 47 C.F.R. § 76.905(b)). *See also Mercom Inc.*, 10 FCC Rcd 3444 (Cab. Serv. Bur. 1995); *Buenavision Telecommunications of Boyle Heights, Inc.*, 10 FCC Rcd 2354 (Cab. Serv. Bur. 1995).

effective competition demonstrations be based on data utilizing only occupied housing units. . . . [and] the Commission restricted the term 'household' to occupied housing units."[86] The Commission found that "Congress did not intend 'households' to have a different meaning than in the 1990 Census[,]"[87] and in effective competition showings under Section 623, the Commission routinely excludes commercial subscribers in determining whether competition from DBS providers satisfies the statutory fifteen percent test." The legislative history of the 1992 Cable Act confirms that Congress intended Section 623 to apply only to residential subscribers.[89] In addition, the 1992 Cable Act's overarching focus on residential rather than commercial customers similarly demonstrates that Congress intended its rate regulations to apply exclusively to residential subscribers.[90] Inasmuch as commercial establishments are irrelevant to

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86 *Americable International Arizona. Inc.*, 11 FCC Rcd 11588 at para. 6 (Cab. Serv. Bur. 1996).

87 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, *Third Order on Reconsideration,* 9 FCC Rcd 4316,4324 at para. 17 (1994) *("Third Reconsideration Order").*

88 "Unlike SkyTrends' five digit zip code subscriber reports, its zip code plus four reports do not include commercial accounts. **As** such, no reduction of the subscriber totals reported by SkyTrends is needed in the instant case." *Cublevision of Patterson,* __ FCC Rcd __, DA 02-2316 at para. 7 (footnotes omitted) (Med. Bur. released Sept. 19,2002); *see also, e.g., Charter Communications, LLC,* __ FCC Rcd __, DA 02-2171 at para. 5 and n. 14 (Med. Bur. released Sept. 6,2002).

89 *See* H.R. CONF. REP. No. 102-862, at 62 (effective competition); H.R. REP. No. 102-628, at 29-30 (discussing the number of "households" served by cable and its competitors) and 89 (effective competition); S. REP. NO. 102-92, at 8 (expressing concern that "only a small percent of the cable homes" were subject to rate regulation under the Commission's 1991 definition of effective competition).

90 Beside repeated references to "households" in Section 623(*l*), 47 U.S.C. § 543(*l*), Congress (i) specified in Section 621(a)(4) that LFAs must allow cable systems "a reasonable period of time to become capable of providing cable service to all *households* in the franchise area[,]" 47 U.S.C. § 541(a)(4) (emphasis added); (ii) required "evidence of viewing patterns in cable and noncable *households* within the areas served by the cable system" in market modification petitions under Section 614(h)(1)(C)(ii)(IV), 47 U.S.C. § 534(h)(1)(C)(ii)(IV) [emphasis added); (iii) authorized the Commission under Section 612(g) to promulgate additional leased access regulations "at such time as cable systems with 36 or more activated channels are available to 70 percent of *households* within the United States and are subscribed to

(continued. . .)